BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R., pp. 43-45) was rendered on April 25, 1944; 44 U. S. Tax Cases 9295. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division. Judgment was rendered by said District Court (R., p. 29), on January 4, 1943.

Jurisdiction.

1. The date of the judgment to be reviewed is April 25, 1944; the petition for writ of certiorari is being presented before July 25, 1944.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A. Section 347, and Rule 38, subdivision (5) of the Rules of the Supreme Court.

3. The nature of the within case and the rulings of the Circuit Court are such as to bring the case within said jurisdictional provisions.

The case involves an important question of federal law which has not been and should be settled by the Supreme Court. The action was brought for the refund of floor stocks taxes paid under the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) (R., pp. 2-7). A claim for refund of said taxes, which had

been filed with the Commissioner of Internal Revenue under Title VII of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96 (R., pp. 11-19) was rejected by him (R., pp. 19, 24-25). The Circuit Court affirmed the judgment of the District Court dismissing plaintiff's complaint and ruled that there was no error in said dismissal, since plaintiff has failed to present evidence to the Commissioner in support of its claim for refund; and that under the statute and regulations, a claim submitted to the Commissioner must be substantiated by evidence (R., p. 45).

Said ruling of the Circuit Court is in direct conflict with a decision of the Circuit Court of Appeals for the Third Circuit and with decisions of Federal Courts in the Third, Fourth, Fifth, Sixth and Ninth Circuits. Said decisions are listed in paragraph "4", *infra*.

4. The cases believed to sustain said jurisdiction are as follows:

Bethlehem Baking Co. v. *U. S.*, 129 F. (2d) 490 (C. C. A., 3d, 1941);

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C., Md., 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D., Calif., 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D., Va., 1940);

Joe Hanna v. *U. S.*, 27 AFTR, 1135 (W. D., Texas, 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 745 (E. D., Pa., 1942);

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A., 5th, 1932) (26 U. S. C. A., 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C., Ky., 1929), Affirmed 64 F. (2d) 1016 (C. C. A., 6th, 1933) (Revenue Act of 1926, Sec. 1113 [a]; Reg. 69, Art. 1304);

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C., Ky., 1925).

5. The questions here involved are substantial for the reason that many hundreds of cases for the refund of taxes paid under the Agricultral Adjustment Act of 1933, involving millions of dollars, are now pending in the Federal Courts; the question as to the construction of the Revenue Act of 1936 and Regulations 96 concerning the necessity for submission of evidence to the Commissioner is involved in a great many of said cases.

The question as to the jurisdiction of the District Court over the action is also important and substantial.

Statement of Case.

This has already been stated in the preceding petition in "Summary Statement of Matter Involved" (pp. 1-3), which is hereby adopted and made a part of this brief.

Specification of Errors.

The Circuit Court erred in holding that:

1. Section 903 of the Revenue Act of 1936 as amended by Section 405 of the Revenue Act of 1939, and Regulations 96 require that evidence be submitted to the Commissioner in support of a claim for refund.

2. Plaintiff's claim for refund did not comply with said statute and regulations.

3. The District Court did not have jurisdiction of the action.

ARGUMENT.

Summary of Argument.

Certiorari should be granted for the reasons that:

POINT I.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT AND DISTRICT COURTS IN OTHER CIRCUITS, ON THE QUESTION AS TO WHETHER SECTION 903 OF THE REVENUE ACT OF 1936 AS AMENDED, AND REGULATIONS 96 REQUIRE THE SUBMISSION OF EVIDENCE TO THE COMMISSIONER OF INTERNAL REVENUE IN SUPPORT OF A CLAIM FOR REFUND OF TAXES PAID UNDER THE AGRICULTURAL ADJUSTMENT ACT OF 1933.

POINT II.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS, INVOLVING SIMILAR STATUTES AND REGULATIONS, ON THE QUESTION AS TO WHETHER THE SUBMISSION OF EVIDENCE TO THE COMMISSIONER OF INTERNAL REVENUE IS REQUIRED IN SUPPORT OF A CLAIM FOR REFUND.

POINT III.

AN IMPORTANT AND SUBSTANTIAL QUESTION OF FEDERAL LAW IS INVOLVED WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THE SUPREME COURT.

POINT I.

The Circuit Court's decision is in direct conflict with decisions of the Third Circuit and District Courts in other Circuits on the question as to whether Section 903 of the Revenue Act of 1936 as amended and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933.

In *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1941), the Circuit Court thus stated the question in the case:

> "The principal question in this case is whether the matter submitted by the plaintiff taxpayer to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 complied sufficiently with the requirements of Title VII, Section 902, of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (providing for refund of such taxes), so as to preserve the plaintiff's standing to sue for the refund following the Commissioner's disallowance of the claim * * *"

The court in the cited case ruled that all evidence relied upon by the taxpayer did not have to be submitted to the Commissioner. It held:

> "In Section 903 of the Revenue Act of 1936 there is the additional provision that 'All evidence relied upon in support of such claim shall be clearly set forth under oath' * * * *Was the requirement in Section 903 intended to impart finality to the decisions of the Commissioner* with respect to claims

for refund by * * * *withdrawing jurisdiction from the courts in such regard because the Commissioner was not satisfied that all evidence relied upon in support of the claim had been clearly set forth under oath?* We think not. Section 903 appears to be in furtherance of the administration of Section 902. It indicates no legislative intent to give greater finality to the decisions of the administrative officer than did Section 902 * * * " (Italics ours.)

The Court in the latter case cited *Hutzler Bros.* v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940). In the said case, the Government's contention was similar to that made in the instant case. It is thus stated by the Court:

"It is contended that by this provision the plaintiff was required to set forth under oath all of the evidence upon which it relied as a condition precedent to the allowance of any claim for refund, and that no suit may be maintained in this Court by plaintiff unless it alleges,—as it did not do,—as an essential part of its right of action, that it had presented to the Commissioner all the available evidence bearing upon its right to refund * * * "

The Court held as to said contention:

" * * * We find this position of the Government to be without merit. Where a claim has been rejected by the Commissioner and such a fact is alleged in the complaint, no further allegation is necessary for the maintenance of a suit for refund; and in such suit a plaintiff is not limited to the same evidence produced before the Commissioner. *The intent of the statute, reasonably interpreted from*

the language employed and above quoted, is to bar consideration of claims merely on informal statements or memoranda, and to surround the presentation of claims with full verification, but it is not intended that a claimant who produces before the Commissioner certain evidence is forever thereafter barred from introducing further evidence in resorting to a Court proceeding for refund,—a right which is expressly given by Section 905 of the Act." (Italics ours.)

To the same effect as the two cited cases, see:

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);
Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);
Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);
Bricker Baking Co. v. *Rothensies et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

The Circuit Court in the instant case held that "a claim submitted to the Commissioner under the statute and regulations must be substantiated by evidence" (R., p. 45). Said decision, it is submitted, is in direct conflict with the decisions above set forth.

POINT II.

The Circuit Court's decision is in direct conflict with decisions of the Fifth and Sixth Circuits involving similar statutes and regulations on the question as to whether the submission of evidence to the Commissioner of Internal Revenue is required in support of a claim for refund.

Petitioner's authority for reference to other statutes and regulations concerning other claims for refund is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2). The purpose of said statute is thus stated (pp. 699, 700):

> "The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. The greater number of claims which may be filed relate to claims for compensating taxes and floor stock taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. *The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund under existing law.* The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he

> will then have recourse to the district court or the Court of Claims." (Italics ours.)

The manner in which "any other claims for refund under existing law" was handled is illustrated in the following cases; petitioner's interpretation of Section 903 of the Revenue Act of 1936, here involved, is supported by these cases which place a similar interpretation on similar statutes concerning "other claims for refund".

In *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929), affirmed 64 F. (2d) 1016, the Revenue Act of 1926 (Sec. 1113[a]) and Regulations 69 (Art. 1304) were involved. The court held:

> "The provision contained in Article 1304 of Treasury Regulations 69, *supra*, to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question * * *."
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> "Fairly construed, the language of the regulations just quoted *does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the taxpayer entirely free, if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in court, new and additional evidence in support of the fact or reasons relied upon to establish the illegality of the tax." (Italics ours.)

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932), the statute and regulations involved

were 26 U. S. C. A. 156 and Reg. 45, Art. 1036. The court stated:

> "The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath'. * * * *This does not mean that the claim for refund must have contained all the evidence or argument* that is offered in the suit, but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds * * *."

In *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925), the court stated as follows:

> " * * * in suits to recover internal revenue taxes erroneously or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, *jurisdiction to finally determine such matter is conferred upon the Judicial Dept.*, provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
>
> "In view of these statutory provisions (Section 3226 of the Revised Statutes, among others) and the authorities referred to, *this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case de novo, without in any way being limited to the evidence heard by the Commissioner, and unprejudiced by any action he may have taken in the matter.* * * * " (Italics ours.)

Section 903 of the Revenue Act of 1936 and Article 202 of Regulations 96 (see Appendix) involved in the instant case are similar in their requirements to the statute and regulations involved in *Paul Jones & Co.* v. *Lucas*, and *Snead, Collector* v. *F. H. Elmore*, *supra*. The Circuit Court herein found (R., p. 45) as contended for by petitioner, that the regulations involved in the two cited cases "do not require that the evidence on which the claimants relied be presented to the Commissioner".

It is submitted that the said finding is inconsistent with the Court's decision herein that under Section 903 and Regulations 96 evidence must be submitted to the Commissioner, in view of the similarity in statutory requirements; that said decision defeats the purpose of said statute as stated in the Congressional Committee Report, *supra*, that claims for refund "shall be handled in the same manner as any other claims for refund under existing law"; and that said decision is in direct conflict with the decisions in the two cited cases.

POINT III.

An important and substantial question of federal law is involved which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, "that this court is without jurisdiction of the matters and things of which the plaintiff complains, and is without jurisdiction to render judgment in favor of plaintiff and against defendant * * *" (R., p. 8) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction, has ruled, in effect, by its affirmance of the dismissal of

the complaint, that the District Court has no jurisdiction of the action.

Whether the submission of evidence to the Commissioner of Internal Revenue is a condition precedent to the District Court's jurisdiction of the action, so that failure to submit such evidence would oust the Court of jurisdiction, is a substantial question of federal law and of the utmost importance and should be settled by the Supreme Court. Further, there are many hundreds of cases such as the instant one still pending in the Federal Courts. Recovery will be denied claimants in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

It is therefore respectfully submitted that this case is one calling for an exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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